and not to descend to the details of all questions which may arise on each particular topic. It is for the magistrate, and the jurisconsult, penetrated with the general spirit of the laws, to discuss their application:" *Discours Preliminaire* to Code Napoléon.

53. It is a noteworthy fact that within a few years after the promulgation of the Code Napoléon, there were numerous volumes of French reports on different questions arising thereon, as well as volumes of statutory law made in France: Guthrie's Mod. Law of Eng., p. 3, n.

54. Of this code it has been recently observed, that, as the offspring of that imperial power which re-established confiscation, and reopened Bastilles, it is, in many respects, unworthy of the present state of French civilization: Enc. Brit., tit. "Punishment," p. 735.

55. Upon the whole, then, it is not a matter of surprise, that the national courts of the United States—feeling compelled, owing to their peculiar position, to ignore the common law in its full force—on the one hand see the vilest criminals escaping with impunity; and, on the other hand, from the extreme necessities of the case, are compelled to adopt, perforce, without any direct statutory authority whatever, the common-law doctrine of contempts, and, for their punishment, the common-law inflictions of fine and imprisonment. J. T.

*(To be continued.)*

## RECENT AMERICAN DECISIONS.

### *Supreme Court of Iowa.*

### CLARK *v.* THE CITY OF DES MOINES.

Agents, officers, or even a city council of a municipal corporation, cannot bind the corporation by any act which transcends their lawful or legitimate powers. And this rule applies to the issue of negotiable as well as non-negotiable evidences of debt.

The duties and powers of the officers of a municipal corporation are prescribed by the statute, and every person dealing with them as such may know, and is charged with knowledge of the nature of these duties and the extent of these powers.

A corporation may set up a plea of *ultra vires*, or its own want of power under

its charter or constituent statute to enter into a given contract, or to do a given act, in excess of its corporate power and authority.

Negotiability will not validate obligations which are not binding because of want of power to make them.

Warrants drawn by the proper officers of a municipal corporation on the treasurer thereof, are not bills of exchange, but are, in legal effect, the promissory notes of the corporation.

Municipal corporations have and can exercise only such powers as are expressly granted, and such incidental ones as are necessary to make these powers available, and are essential to effectuate the purposes of the corporation; and these powers are strictly construed.

When the officers of a city have no express power, to issue for current, ordinary debts, negotiable paper which shall be free from equities in the hands of purchasers, and it is not necessary as an incident to those granted, or to carry out the purposes and objects of the corporation, it cannot be held to exist by implication.

The assignee of warrants drawn by the officers of a municipal corporation on the treasury thereof, is bound, at his peril, to ascertain the nature and extent of the powers of such officers and of such corporation.

The want of corporate power or the want of authority in the municipal officers, cannot be supplied by their unauthorized action or representations.

Warrants issued by a municipal corporation in payment of a judgment at the rate of one dollar in warrants for every seventy-five cents due on the judgment, are tainted with usury.

It may be doubted whether a municipal corporation is bound by the action of its council in agreeing to pay a sum clearly, distinctly, and ascertainably greater than is legally due: *arguendo*, per DILLON, J.

No municipal corporation can erect a toll-bridge and levy and collect tolls, unless authorized by the law of the state.

The city of Des Moines possessed no power, under the charter of 1857, to erect a toll-bridge, either by itself or jointly with an individual.

A municipal corporation has no power to lend its credit or make its accommodation paper for the benefit of citizens, to enable them to execute private enterprises.

The building of sidewalks is, ordinarily, a legitimate municipal object.

When a municipal corporation, acting under the Constitution of 1846, issued in payment of a *bonâ fide* indebtedness, scrip to circulate as money, after which the scrip was taken up by the issuance of ordinary warrants on the treasury thereof for the amount of the same, it was held that the transaction could not be impeached by the corporation on the ground that the scrip was illegal and void.

APPEAL from Polk District Court.

This was an action against the city of Des Moines, based upon two hundred and twenty-two different city warrants or orders. The plaintiff sued as assignee or holder. He was not the payee of any of them. A copy of one of the class of orders payable out of the "general fund," is as follows:—

"No. 783. CITY WARRANT. $8.00

DES MOINES, IOWA, October 21st 1862.

To the Treasurer of the City of Des Moines:

Pay U. H. White or bearer, eight dollars, out of any moneys in the general fund, not otherwise appropriated.

THOS. CAVANAUGH, Mayor.

Attest. H. W. KING, Recorder."

Indorsed: "Presented November 24th 1862. J. E. HULL, City Treasurer."

Another set of warrants were in the same form as the one above set out, and payable to M. P. Turner, or bearer, "out of any moneys in the West Side Road Fund, not otherwise appropriated."

Other warrants were in the same form, issued to different persons, payable "out of any moneys in the East Side Road Fund, not otherwise appropriated."

Other warrants were in the same form as the one above copied, payable out of the general fund, with this written indorsement across the printed blank on which they were issued, viz.: "Issued for scrip surrendered, and bearing six per cent. interest, from January 17th 1860. H. W. KING, Recorder. Presented January 14th 1863. J. E. HULL, City Treasurer."

Various defences were made, which, with the other questions arising upon this appeal, will be noticed in the opinion. Judgment in the District Court, passed for the plaintiff, partly upon demurrer and partly upon the verdict of a jury.

The defendant is the appellant.

*Polk & Hubbell*, for appellant.

*Phillips & Phillips*, for appellee.

The opinion of the court was delivered by

DILLON, J.—I. The plaintiff is the assignee of the orders or warrants in the suit. It is not alleged in the answer, nor was it shown on the trial, that he was not a *bonâ fide* holder of these instruments for value, and without notice of matters now pleaded, as defences thereto. It is claimed by the plaintiff that the warrants being signed by the proper officers of the city, authenticated by its corporate seal, and negotiable in form, he, as the innocent holder thereof, stands, like a similar holder of ordinary mercantile

paper, free from and unaffected by the equities and defences which the city set up in bar of his recovery.

This view of the law was the one adopted by the court below, in its rulings prior to and upon the trial. Thus, after stating the law applicable to the warrants issued for "scrip surrendered,"—as to which more will presently be said—the court charged the jury as follows: "As to all the other warrants, they are negotiable, and there is no evidence tending to show that they were issued without authority or without consideration; all evidence of this kind having been excluded, because it was not shown or offered to be shown that the plaintiff had knowledge of such defences; and if you believe, from the evidence, that the warrants were issued by the defendant and that plaintiff is the owner thereof, you will find for him as to all such warrants." So the bill of exceptions recites, that "the defendant, on the trial, offered to show by the record of the proceedings of the city council, that all of said warrants were issued *without any authority from the said city council*, and without any vote of said council authorizing the same," but this evidence the court refused to receive, because the warrants were negotiable and there was no offer to show that the plaintiff took them with notice of such defect or irregularity.

This view of the law is, we think, erroneous. If my name be signed to a promissory note by a person representing himself to be my agent, but "without any authority" from me, I am not bound; and I am no more bound because the obligation has been put in a negotiable form than if it has been put in a form not negotiable.

And the same rule must and does apply to paper purporting to be issued by the agents or officers of public or municipal corporations. The general principle of law is well known and definitely settled, that the agents, officers, or even city council of a municipal corporation, cannot bind the corporation when they transcend their lawful and legitimate powers.

This doctrine rests upon this reasonable ground. The body corporate is constituted of all of the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one, therefore,

may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule; that the corporation is bound only when its agents (by whom, from the very necessities of its being, it must act, if it acts at all) keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of *ultra vires*, that is, set up as a defence its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate power and authority. The cases asserting these principles are numerous and uniform; some of the more important and striking ones only need be cited: *Mayor of Albany* v. *Cunliff* (city not liable for negligently building bridge under an *unconstitutional* statute), 2 Comst. (N. Y.) 165 (1849); reversing s. c., 2 Barb. 190; *Cuyler* v. *Trustees of Rochester* (laying out street contrary to charter), 12 Wend. 165 (1834); *Hodges* v. *Buffalo* (4th July appropriation), 2 Denio 110 (1846); *Halstead* v. *The Mayor*, 3 Comst. 430 (1850); *Martin* v. *The Mayor*, 1 Hill 545; *Boone* v. *Utica*, 2 Barb. 104; *Cornell* v. *Guilford*, 1 Denio 510; *Boyland* v. *The Mayor and Aldermen of New York*, 1 Sandf. (N. Y.) 27 (1847); *Dill* v. *Wareham*, 7 Metc. 438 (1844); *Vincent* v. *Nantucket*, 12 Cush. 103, 105 (1858), per MERRICK, J.; *Stetson* v. *Kempton*, 13 Mass. 272; *Parsons* v. *Inhabitants of Goshen*, 11 Pick. 396; *Wood* v. *Inhabitants of Lynn*, 1 Allen (Mass.) 108 (1861); *Spalding* v. *Lowell*, 23 Pick. 71; *Mitchell* v. *Rockland*, 45 Me. 496 (1858); s. c., 41 Id. 363; *Anthony* v. *Adams*, 1 Metc. (Mass.) 284 (1840); *Western College* v. *Cleveland*, 12 Ohio 375 (1861); *Commissioners* v. *Cox*, 6 Ind. 403 (1855); *The Inhabitants* v. *Weir*, 9 Id. 224 (1857); *Smead* v. *The Indianapolis, Pittsburgh, and Cleveland Railroad Co.*, 11 Id. 104 (1858); *Brady* v. *The Mayor*, 20 N. Y. (6 Smith) 312; *Appleby* v. *The Mayor, &c.*, 15 How. Pr. 428; *Estep* v. *Keokuk County*, 18 Iowa 199, and cases cited by COLE, J.; *Clark* v. *Polk County*, 19 Iowa 248.

Negotiability will not validate obligations which are not binding, because of a *want of power* to issue them: *Gould* v. *Sterling* (action on loan bonds), 23 N. Y. 464, s. c., 1 Am. Law Reg. N. S. 290, and note of Prof. Dwight thereon, a portion of whose remarks are so strikingly in point that we quote them: "It

seems entirely clear," he observes (Id., p. 297), "that no representation by an agent can even establish the fact of agency. If a person, who is not in fact authorized, represents that he has power to execute a promissory note for another, the instrument, so far as the supposed principal is concerned, is utterly void. The negotiability of the note will have no effect upon the question, as the inquiry turns upon the existence of the note itself. The term "negotiability" presupposes the existence of an instrument made by a person having *capacity or power* to contract in that particular manner." (S. P., *Hull & Argalls* v. *Marshall Co.*, 12 Iowa 142, 162, per LOWE, J.) In *Starin* v. *Genoa*, and *Gould* v. *Sterling*, 23 N. Y. 452, 464, the plaintiffs were *bonâ fide* holders, for value, of negotiable bonds, and the Court of Appeals of New York held that they were bound to inquire into the power to issue them. "One who takes a negotiable note or bill of exchange purporting to be made by an agent," says Mr. Justice SELDEN (Id. 464), "is bound to inquire as to the power of the agent." Analyzing, in the case at bar, the view of the court below, it will be found to involve three several distinct propositions: 1st. That the warrants in suit are *negotiable* paper. 2d. That the officers of the city (mayor and recorder), or at all events the city council, has power to *create* and *issue* negotiable paper, and,

3d. That warrants, like the ones in question, are valid in the hands of an innocent holder, even if issued without authority or without consideration. With reference to this, as well as other portions of the record, it is necessary to examine these propositions:—

(*a.*) The orders in suit are not bills of exchange, as a bill of exchange proper involves the idea of at least two distinct parties, drawer and drawee. The instruments in suit are orders by the city *on itself*—mere directions to its treasurer to pay the amount to the bearer. In legal effect they are the promissory notes of the city: *Miller* v. *Thomson*, 3 Man. & Gr. 576; followed, *Fairchild* v. *The Ogdensburgh, Clayton, and Rome Railroad Co.*, 15 N. Y. 337; *Bull* v. *Sims*, 23 Id. 570, 572; *Clark* v. *Polk County*, 19 Iowa 248. And by usage and statute (Rev., ch. 73) they pass by delivery, and the holder, as "the real party in interest," may bring suit upon them in his own name: *Steel* v. *Davis County*, 2 G. Greene 469; *Brown* v. *Johnson County*, 1

Id. 486; *Campbell* v. *Polk County*, 3 Iowa 467. The debtor corporation may give a written acknowledgment of the debt. It may make this run to order or bearer without invalidating it; but it does not follow, as we shall show, that there is an implied power to invest these with all the qualities of commercial paper.

(*b.*) There is further involved, in the view of the District Court, the proposition that it is competent for the city officers (mayor and recorder) to issue its obligations in a *negotiable form*, and endow them with all of the attributes of negotiable, mercantile securities. Upon examining the charter under which these warrants were issued (Laws 1857, ch. 185, p. 281), no *express* power to issue promissory notes or other negotiable paper is conferred. If the power exists to make paper, which, in the hands of a *bonâ fide* holder, cuts off equities, it must be an *implied* power.

It is a familiar and elementary principle that municipal corporations have and can exercise such powers, and *such only*, as are expressly granted, and such incidental ones as are necessary to make those powers available, and essential to effectuate the purposes of the corporation; and these powers are strictly construed: 2 Kent Com. 298; *Mayor* v. *Cunliff*, *supra*, and the authorities cited in connection therewith.

It is held that banking and trading corporations have the implied or incidental power to make negotiable paper: *McCullough* v. *Moss*, 5 Denio 567; *Straus* v. *Eagle Insurance Co.*, 5 Ohio 59 (1855); *Mott* v. *Hicks*, 1 Cow. 513; *Attorney-General* v. *Life and Fire Insurance Co.*, 9 Paige 470; 2 Kent Com. 299; 1 Pars. N. and B. 165. And the same rule has in some cases been applied, by way of analogy, to municipal and public corporations; but not so as to cut off inquiry into the validity of the paper or just defences: *Kelley* v. *The Mayor*, *&c.*, 4 Hill 263. See *Chemung Canal Bank* v. *Supervisors*, *&c.*, 5 Denio 517; *Carne* v. *Brigham*, 39 Me. 39; *Clarke* v. *School District*, 3 R. I. 199. To this doctrine, as applied to commercial corporations, we see no objection; but we do see many and serious objections to treating the ordinary warrants of counties and cities, as possessing *all* of the incidents and qualities of commercial paper.

These warrants are unlike bonds issued on time, negotiable in form, and for sale in the market, as, for example, those issued by

towns, cities, and counties to railroad companies, under express act of the legislature (for they cannot be issued without *express* legislative authorization), in payment for stock subscribed. Such securities are made and issued for the express purpose of raising money by their sale; and the attainment of this object would be embarrassed or defeated if they were subject to equities in the hands of *bonâ fide* purchasers. They are, therefore, held to be negotiable, with all the incidents of negotiability: *Clapp* v. *Cedar County*, 5 Iowa 15; *Morris Canal Co.* v. *Fisher*, 1 Stock. Ch. 667 (1855), s. c., 3 Am. Law Reg. O. S. 423; *Gelpcke* v. *Dubuque*, 1 Wal. (U. S.) 175; *Craig* v. *Vicksburg*, 31 Miss. 216; *Jackson* v. *Railroad Co.*, 2 Am. Law Reg. N. S. 585, s. c., Id. 748, and note of Judge REDFIELD; *Chapin* v. *Vermont and Massachusetts Railroad Co.*, 8 Gray 575; *Clark* v. *Janesville*, 10 Wis. 136; *Maddox* v. *Graham*, 2 Metc. (Ky.) 56; *Gould* v. *Sterling*, *supra*; *White* v. *Railroad Co.*, 21 How. 575; Id. 539; *Bank* v. *The New York and New Haven Railroad Co.*, 3 Kern. 599, s. c., 4 Duer 480.

But with warrants like those in suit, it is entirely different. Under the charter of the city (§ 18), it is made "the duty of the city council to liquidate and settle all claims and demands against the city." And by the same section it is provided that no money shall be drawn from the city treasury "except by order under the authority of the city council."

The city council audit and allow claims and demands, and their action in this regard is to be entered of record (Charter, § 3). Upon a certified copy of these proceedings, the treasurer of the city would be authorized to pay the claimant.

But by usage, or perhaps under a by-law, orders like those before us are drawn upon the treasurer. This mode is adopted for convenience, and these instruments are not to be assimilated, in all respects, to ordinary commercial paper.

On this question the argument may be thus condensed: There is no *express* authority to the officers of this city to issue negotiable paper which shall be free from equities in the hands of purchasers. And the existence of such a power is not necessary as an incident to those granted, or to carry out the purposes and objects of the corporation, and would be attended with abuse and fraught with danger. It should not, therefore, be held to exist as an *implied* power: *Smith* v. *Cheshire*, 13 Gray (Mass.) 318

(1859); *Inhab., &c.*, v. *Weir*, 9 Ind. 224 (1857); *Halstead* v. *The Mayor, &c.*, and other cases cited, *supra*. Whether the *corporation defendant* could *specially confer* power upon its officers to bind it by the issue of negotiable paper, which should be free from equities, is a question which the record does not require to be decided.

(*c.*) It is further involved in the view of the District Court, that an innocent holder of one of these warrants may recover thereon, though it be issued without consideration or without authority. The unsoundness of this view we have already pointed out. The warrants purport to be issued by the agents of the city. The plaintiff, in taking these warrants, was bound, at his peril, to ascertain the nature and extent of the power of these officers and of the city corporation; *Delafield* v. *State of Illinois*, 2 Hill 159, 174; 26 Wend. 192, s. c., 8 Paige 53; *Hodges* v. *Buffalo*, 2 Denio 110; *Supervisors* v. *Bates*, 17 N. Y. 242; *Overseers* v. *Overseers of Pharsalia*, 15 Id. 341; *Butterfield* v. *Inhabitants of Melrose*, 6 Allen 187; *Rossire* v. *City of Boston*, 4 Id. 57; *Zabriskie* v. *Cleveland, Columbus, and Cincinnati Railroad Co.*, 23 How. 381, 398.

By examination, he may find that these warrants cannot lawfully be issued without the order of the city council. This must be entered of record "on the journals of the city, which shall be open" (so the charter declares) "to the inspection and examination of every citizen." A warrant issued by the mayor and recorder without the previous order of the council, is void. They have no authority to do it, and it would be substantially a forgery. A purchaser of such a warrant is bound at his peril, at least, to ascertain that the claim upon which it is founded has been liquidated and settled by the council. A representation by municipal officers that this has been done (and the issue of such a warrant is in substance such a representation), will not be binding upon the corporation. Why? The answer is, because an agent can neither create nor enlarge his powers by his unauthorized representations. The law on this subject has of late years been much investigated, and will be found discussed and examined in a most critical, able, and exhaustive manner, in the following important cases: *Mechanics' Bank* v. *New York and New Haven Railroad Co.* (Schuyler Frauds), 13 N. Y. 599 (1856); *Farmers' Bank* v. *Butchers' and Drovers' Bank* (where teller

without *real* but with *apparent* power, certified negotiable check as good), 14 N. Y. 623, s. c., 16 Id. 125; *Claflin* v. *The Farmers' and Citizens' Bank, &c.*, 25 Id. 293, s. c., 2 Am. Law Reg. N. S. 92, and note; *Gould* v. *Sterling, supra;* the two last distinguished from the case in 14 N. Y. 623; *Griswold* v. *Havens*, 25 N. Y. 595 (1862); 26 Id. 505. Now without entering into these interesting discussions respecting the liabilities of principals *in certain cases*, for the acts of agents *apparently*, but not *really*, within the scope of their commission, we need only observe that if it be conceded that the mayor and recorder had the *apparent* power to issue warrants like the ones in suit, still if they did not *really* have this authority, their representations that they possessed it would not be the representations of a fact which from its nature (as in the case of the teller, who certified the checks), rested *peculiarly* within the knowledge of the agent. On the contrary, the charter and the journals of the corporation, open to public inspection, afford to every person the *certain means* of ascertaining the existence of the authority of these officers to issue the warrants.

We have been able, after a very thorough investigation, to find no case which holds that city and county warrants, like those before us, are freed from equities when in the hands of *bonâ fide* holders. Nor has the plaintiff's counsel called our attention to any such. On the other hand, we have found several cases in different states expressly holding that such orders were not commercial paper in the hands of an innocent holder, so as to exclude evidence of the legality of their issue or preclude defences thereto. See *Halstead* v. *The Mayor, &c., of New York* (on audited city warrants like those in suit), 5 Barb. 218 (1849), s. c., affirmed in Court of Appeals, but where the rights of a *bonâ fide* holder were not passed on, 3 Comst. 430 (1850); *People* v. *El Dorado County* (on audited county warrants distinctly holding that *bonâ fide* assignee stood in shoes of payee), 11 Cal. 170 (1858); s. p., *Sturtevant* v. *Liberty* (town orders), 46 Me. 457; *Smith* v. *Inhabitants of Cheshire*, 13 Gray (Mass.) 318 (1859); *Andover* v. *Grafton* (on note made by town), 7 N. H. 298 (1834); *Sanborn* v. *Deerfield*, 2 Id. 251, 254; *Dalrymple* v. *Whittingham*, 26 Vt. (4 Deane) 345; *Inhabitants* v. *Weir*, 9 Ind. 224 (1857); *School District* v. *Thompson*, 5

Minn. 280 (1861), approving 5 Barb. 218; *Clark* v. *Polk County*, 19 Iowa 248, and cases cited by COLE, J.

It must not be supposed, that certain cases recently decided by the Supreme Court of the United States have escaped attention. These cases were brought upon negotiable county and city *bonds*, and where there was *express* power to issue them: *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539, 544; approved and followed in *Bissell* v. *Jeffersonville*, 24 Id. 287 (1860), and *Gelpcke* v. *Dubuque*, 1 Wallace 203.

In the latter case, speaking of the express power of the *city of Dubuque* to issue the bonds sued on, Judge SWAYNE, following *Knox County* v. *Aspinwall*, laid down this rule: "When a corporation has power, under any circumstances, to issue negotiable securities, the *bonâ fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached, for any infirmity, in the hands of such a holder than any commercial paper."

Upon this, without calling in question its correctness in the particular case in which it was used, we remark: 1. That this language was employed in a case where there was *express, specific power*, on the part of the city, to issue *negotiable bonds*, and in that respect is distinguishable from the case before us. 2. Experienced jurists, conscious of difficulty and danger attending it, hesitate to lay down general and unqualified rules, professing to embrace all cases. With due deference, the language above quoted is susceptible of being taken to assert a doctrine, which, without reasonable limitations, cannot be true as respects public and municipal corporations. Suppose a city charter expressly authorized the common council to issue negotiable securities for corporate debts, and that the mayor and recorder, without an order of the council, fabricate,—manufacture,—such securities, and that they find their way into the hands of innocent purchasers. It cannot be that Judge SWAYNE means that "the *bonâ fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority."

The true rule is, that the want of corporate power, or the want of authority in the municipal officers, cannot be supplied by their unauthorized acts or representations: *Gould* v. *Town of Sterling*, *supra*; *Treadwell* v. *Commissioners*, 11 Ohio 183, com-

menting on and criticising *Knox County* v. *Aspinwall*, 21 How. 539.

Any other doctrine nullifies the limitations and checks contained in the charter for the protection of the corporators, and needlessly invests the public officers and agents with the power successfully to "*Schuylerize*" our public corporations, without limit and without remedy. Whether warrants, like those in suit, issued by order of the council, but which order was based upon the allowance of a claim for which the city was not legally liable, would, in the hands of a *bonâ fide* holder, be free from equities, is a question of great difficulty, and which we pass, because not necessary to be now decided. It will be found discussed and decided in some of the authorities before referred to.

II. For answer to the third count in the petition, the city says "that the warrant therein set out was executed to Keyes and Crawford, the payees thereof, in satisfaction of a judgment held and owned by them against the city at the rate of one dollar in warrants for each seventy-five cents due on said judgment; that the city council thereby exceeded their authority, and the said warrant thus issued is illegal, usurious, and void."

To this defence the court sustained the plaintiff's demurrer, and the defendant excepted and abided by his answer. The legal sufficiency of this defence is one of the questions presented in this appeal. For forbearance or "giving day of payment," a creditor under our Statute of Usury cannot lawfully receive or contract to receive more than ten per cent. interest.

If I purposely give my note for $100, payable on demand, in satisfaction of a debt or judgment for only $75, it is *primâ facie*, and perhaps conclusively, usurious. And so it is if the same be done by a corporation. Besides, it may well be doubted, whether the corporation is bound by the action of its council, in agreeing to pay a sum clearly, distinctly, and ascertainably greater than is legally due. Courts hold a stiff rein on corporate allowances; and auditing officers or bodies cannot, in general, allow and pay claims, however meritorious, if they are not legally chargeable: *People* v. *Stout*, 23 Barb. 349; *People* v. *Lawrence*, 6 Hill 244 (1843); Id. 463; *Chemung Canal Bank* v. *Supervisors*, 5 Denio 517, 521 (1848); *Halstead* v. *The Mayor, &c.*, 5 Barb. 218, s. c., 3 Comst. 430; *Lake* v. *Trustees of Williamsburg*, 4 Denio 520; *Supervisors* v. *Briggs*, 2 Id. 26, s. c., 2 Hill 135;

*Augusta* v. *Leadbetter*, 16 Me. 45; compare *Bean* v. *Jay*, 23 Id. 117, 121; and see also *Campbell* v. *Polk County*, 3 Iowa 467.

The defence pleaded was good *pro tanto*, and the demurrer should have been overruled instead of sustained.

III. It is also set up in bar of recovery on certain warrants payable to Turner, that they "were issued and *loaned* to aid him in constructing a toll-bridge across the Raccoon river in the corporate limits of the city." This is the substance of the answer in this respect. No person or corporation can erect a toll-bridge and levy and collect tolls, any more than a person or corporation can set up a ferry and levy and collect ferriage, unless this be authorized by the law of the state. In *De Jure Maris* (ch. II.; Id., ch. III.), Sir Matthew Hale says: "No man can take a settled or constant toll even in his own private land for a common passage without the king's license:" 4 Am. Law Reg. N. S. 513, and authorities there cited; *Prosser* v. *Wapello County*, 18 Iowa 327; *Mullarky* v. *Cedar Falls*, 19 Id. 21.

How Turner obtained authority to erect a toll-bridge within the corporate limits of the city, does not appear. The authority may, as in the Cedar Falls case just cited, antedate the corporate organization of the city. Whether under the statute it can be conferred by the county authorities within the limits, and upon the streets of the city, we need not stop to inquire. We will assume, on the averments, that Turner had the lawful power to erect the bridge. The city of Des Moines, under its charter, possessed no power to erect *such* a bridge for itself and by itself: *Mullarky* v. *Cedar Falls*, *supra*. Nor would it have the power to erect such a bridge jointly with an individual, or to appropriate funds of the city in aid of such a private enterprise.

The power of the city (Charter, § 14) "to improve sidewalks, alleys, and streets," "to make by-laws necessary and proper for the good regulation, safety, and health of the city," would not authorize it to erect or aid in the erection of a *toll-bridge* by a loan of the corporate credit. It might be different as respects *free*, public bridges.

Turner's bridge was, it would appear, essentially an individual enterprise. Let it be granted that, if erected, the bridge would be of advantage to the city by facilitating the intercourse of citizens residing on different sides of the river. So the erection

of an elevator or of a private market-house might be beneficial to the city. But would this justify the city in issuing its warrants, and *loaning* them to a private individual, to aid him in erecting the elevator or private market-house? No instance occurs to us, in which it would be competent for the city to loan its credit, or make its accommodation paper for the benefit of citizens, to enable them to execute private enterprises: 1 Parsons N. and B. 166; *Smead* v. *Indianapolis, Pittsburgh, and Cleveland Railroad Co.*, 11 Ind. 105.

To recognise such a right would be to break down, to a great extent, the charter checks and limitations on the power of the corporation—checks and limitations designed to protect and secure the inhabitants against the dangers of speculative and extra-municipal projects. Though the averments are not very full and specific, the answer sets up that the warrants were *loaned* to Turner to aid him in building a toll-bridge for himself, and this, *primâ facie* at least, is in excess of the corporate authority of the city. If the bridge was already erected on one of the streets of the city, if Turner, by law, had the right to exact tolls from the citizens, we will not say that the corporation would not be authorized to make, among other agreements that might be imagined, an arrangement whereby its citizens might pass free from tolls, and issue its warrants in payment for the privileges thus acquired. No such case is presented. We decide only that it cannot *loan* its credit or paper to aid an individual in constructing a toll-bridge, or to aid any other scheme essentially private. To prevent municipal corporations from engaging in banking and speculative enterprises, it is necessary, as this case shows, and as the current history of these bodies has demonstrated, to keep the *corporate wings clipped down to the legal standard.* The court erred in sustaining the demurrer to this part of the answer.

As to the warrants issued to Johnson, different considerations apply. Building sidewalks is, under the charter, a legitimate municipal object. Why the street committee had no authority in law to make such a contract, is not alleged. The ruling of the District Court on this point is affirmed.

IV. Certain of the warrants in suit purport on their face to have been issued "for city scrip surrendered." The city pleaded, that the scrip thus surrendered, and which constituted the con-

sideration of these warrants, was issued in violation of Art. 5 of the old Constitution and chap. 147 of the Code of 1851—*being intended to circulate as money.*

To this the plaintiff responds, in substance: that the scrip itself was issued by the city, and used by it to redeem city warrants founded upon a valuable consideration. It appeared on the trial, that in 1857 the city council passed an ordinance reciting: "the present scarcity of money," "the impossibility of collecting taxes," "the impolicy of paying interest on loans," and the policy of issuing "for general circulation, convenient warrants" that tax-payers might become enabled to pay their taxes, and providing for the issue of engraved city warrants in denominations of $1, $2, $3, and $5. In phraseology the warrants thus issued are like those now in suit. In appearance they are like bank-bills, being on bank-note paper, with vignette, &c.

This scrip the treasurer was authorized to receive for taxes and to exchange for outstanding city warrants drawn in the usual form. The evidence does not show that any scrip was issued by the city, except to pay city indebtedness, or in exchange for outstanding evidences of city debts. The "scrip" was for a time popular, and, as invited by the city, its creditors received it in payment or in exchange for other evidences of municipal liability. Time wore on; the scrip would seem to have declined in popular favor, and not to have realized the high anticipations which its emission had inspired. Empirical, if not illegal, the remedy did not cure or relieve the corporate ills recited in the ordinance to exist. So in 1860, the council "changed its base." In 1857 it asked warrant-holders to exchange them for scrip. They did so. In 1860 it authorized "the issue of city orders for the redemption of city scrip." Scrip-holders conforming to the wishes of the city, then surrendered scrip and received warrants, such as those in suit, and such as those which they had given up to the city when they received the scrip.

On this part of the case the court charged that the scrip was illegal, because issued in violation of the constitution, and so far the defendant does not complain; but it further directed the jury, in substance, that if the city owed a valid and admitted debt, paid it in scrip, and then took up the scrip by issuing the warrants in question, the law regards this as a settlement of the transaction, and the warrants would be supported by a sufficient consideration,

and be valid and binding. The jury so found the fact to be, and the evidence fully sustains the finding. Under the circumstances, this defence is entitled to no favor. Unless corporations are exempt from the ordinary principles of fair dealing that apply between man and man, this defence has no just foundation. It is the duty of courts not to allow the honest and just merits of a cause to be entangled in the meshes of sophistical reasoning, and rules purely technical. Not a member of the city council would, we are persuaded, make such a defence for himself. We have multiplied and constantly recurring examples of the fact, that under the shield of their corporate character men daily do acts which they would never do as individuals. Nor are these examples confined to this side of the Atlantic. "It is a familiar fact," says Mr. Herbert Spencer, "that the corporate conscience is ever inferior to the individual conscience; that a body of men will commit, as a joint act, that which every individual of them would shrink from did he feel personally responsible:" Essays, No. VII., p. 261, Am. ed., 1865; and see Id., Essay V., for description, perhaps too highly colored, of the workings of English reformed municipal corporations.

That the charge of the District Court was correct, even conceding the scrip to be illegal, we have no doubt. See *Mullarky* v. *Cedar Falls*, 19 Iowa 21; *Alleghany City* v. *McClinkan*, 14 Pa. 81 (1850); *Early* v. *Mahan*, 19 Johns. 147.

For the reasons above given, however, the judgment must be reversed.

We have delayed the publication of the foregoing opinion, with the hope of being able to prepare a note to accompany the same, but upon reflection we have become convinced that the opinion contains most of the cases bearing upon the questions discussed, and we have not been able to perceive any good ground to qualify the propositions contained in the syllabus of the case.

The subject of the extent of municipal authority has been largely discussed in some of the states in connection with appropriations made in furtherance of the war to put down the rebellion. But the general principle here declared has been adhered to, with great strictness, notwithstanding the pressure, in particular cases, for an extension of municipal authority by way of construction. There can be no question, we apprehend, that municipal, like other corporations, exist and act solely by force of the powers conferred upon them, either by special charter or general legislation. It is therefore a mere truism to declare, that the agents of a municipal corporation cannot bind the municipality beyond the limits of its powers, and that those who contract with the agents of such corporations must, at their peril, take notice of the limits of those powers and, by consequence, of those of their agents. It is very obvious, too, that any corporation

may take advantage of its own defect of authority, for if that were not so it would become impossible, in practice, to restrain the acts of any corporation within the limits of its powers.

The proposition, too, here declared, that a contract, professedly made by a corporation, beyond the limits of its powers, derives no additional force from its being in negotiable form, is one of considerable practical importance, and one which might not readily strike the mind of all with favor. The fact that negotiable paper, made in violation of statutory enactments, and which on that account would be void between the original parties, has been held valid in favor of *bonâ fide* holders for value, has led many to suppose that negotiable paper made by corporations, *ultra vires*, would nevertheless bind the company in favor of such *bonâ fide* holders for value. But it was held in the case of *Balfour* v. *Ernest*, 5 Jur. N. S. 439, s. c., 5 C. B. N. S. 601, that a bill of exchange drawn on behalf of a joint stock company, in the form prescribed by statute, does not bind the company, even in the hands of a *bonâ fide* holder, if the bill be drawn for any purpose, not within the scope of the business of the company, or the powers of the directors. And the proposition is very obviously just, upon general principles, that a corporation cannot enlarge their powers to contract by assuming to do so in a particular form.

What is here decided, in regard to the want of power in a municipal corporation to erect a bridge and levy and collect tolls for passing the same, is clearly the result of the well-settled doctrine, that such corporations have no power to make a railway grant for the transportation of passengers and collecting of fares.

The discussion of these several topics by the learned judge, and the careful collection of the cases bearing upon the questions discussed, will render the opinion exceedingly valuable to the profession. And we have often regretted that our courts of last resort had not more leisure to prepare their opinions in a similarly satisfactory manner. But it is the curse of our day and generation, that our ablest and most useful men ruin themselves and fail to serve the public with any acceptance, just because they are pushed beyond their strength and ability; and by attempting to do ten times as much as they can do well, really fail of doing anything to any purpose. We feel that much of this complaint may well be laid at our own doors, notwithstanding the utmost effort to resist the tendency. I. F. R.

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## *Court of Appeals of Kentucky.*

### COMMONWEALTH *v.* REED.

The commonwealth may maintain a civil action for its own use for damages against a sheriff for breach of his official bond by negligence in arresting a party charged with crime, or by wilfully taking insufficient surety from such party for his appearance.

THIS was an action against a sheriff and his sureties for an alleged breach of his official bond, in negligently failing to arrest Stephen Patterson, on four bench warrants issued on four several

indictments for unlawful gaming, and also in wilfully taking insufficient security for Pinkney Patterson, whom he had arrested under indictments for permitting unlawful gaming in his house—the petition alleging the escape of Stephen and the insolvency of Pinkney Patterson.

PER CURIAM.—The Circuit Court having sustained a demurrer to the petition—which is good if such an action be maintainable—the only question for revision by this court is, whether the commonwealth has a right, for its own use, to recover in a civil suit, against the sheriff and his sureties, damages for a breach of their covenant.

Although there may be no precedent of any judicial recognition of such a remedy, yet we can perceive no reason why it should not be available, and it seems to us that principle sanctions it, and that it is sustained by both the common and statutory law of Kentucky.

The sheriff's official bond is required for assuring his fidelity as well to the commonwealth as to every individual who may lose by his infidelity. His delinquencies, as charged in this case, might subject the commonwealth to some insecurity, and to loss of revenue which she might have derived from the execution of the process. Why, then, should not she, as well as a citizen, have a right of action for damages to himself from a breach of the bond given to her for securing her interests as well as those of citizens?

The fact that the sheriff may be liable to a fine is no sufficient answer. This is only punitive; the civil action is remunerative. He may be insolvent, and his sureties would not be responsible for the fine. And the actual damage to the commonwealth may greatly exceed the amount of the fine.

Nor is the indeterminateness of the damages and the difficulty of ascertaining their precise amount by any certain or fixed standard, a sufficient answer.

The same difficulty occurs in many other classes of actions undoubtedly maintainable. Nominal damages might always be recovered, and generally the amount of the prescribed fine would afford a definite criterion for assessing the civil damages. In this case no court can assume that had Stephen Patterson been arrested he would ever have been tried, or, if tried, convicted,

or, if convicted, that the fines would ever have been collected by the commonwealth. But still, for every wrong there is a remedy; therefore, the imputed breach of the bond must be actionable upon common-law principles, and the damages must be assessed by the best tests the facts of the case may afford.

Confirmatory and, as we think, only declaratory of the common law—the sixth section of article 8, chapter 83, of Stanton's Rev. Stat., p. 259, provides that "clerks of courts, sheriffs, and other public officers, and their sureties, and the heirs, distributees, devisees, and personal representatives of each, may be proceeded against by suit or motion, jointly or severally, for their liabilities or defalcations by the commonwealth in her own right."

The application of this enactment cannot be restricted by the context of the article in which it is found, and which is too contracted for its useful or consistent operation. But it is, in its range, coextensive with the chapter on revenue, and applies to every case affecting the revenue of the commonwealth, as this case certainly may affect it by possible diminution. One of the principal objects seems to have been to hold the sureties to liability. On these grounds we are of the opinion that the action, as brought, is maintainable, and that, consequently, the Circuit Court erred in sustaining the demurrer to the petition.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

The importance and novelty of the foregoing decision seem to bring it fully within the range of our publication. We cannot say, that we should have been inclined, *à priori*, to have adopted the same view of the law, and still we are far from feeling any decided repugnance to the decision. It seems to us, that the statute of the state referred to in the opinion may be regarded as favoring the view taken by the court. It is true the court also intimates that the view is sustained, by principle, as well as by the common and statutory law of Kentucky.

We feel very confident that the common law of England countenances no such remedy in favor of the government, in cases of a criminal or penal nature, where the default complained of is in not detaining the accused party, when arrested, and where the proceeding is, in form, criminal. The only remedy which could there be resorted to in cases of that character would be by attachment for a contempt of the court before whom the process is made returnable. The English authorities are digested in 14 Petersdorff's Ab. 615. It seems that at common law the remedy by attachment was the only one allowed. Remedies by action in favor of private parties seem to be exclusively of statutory origin in England. But some of the later English statutes have given an action against the party by a common informer suing *qui tam:* 4 Geo. 3, c. 13, s. 4; *Sturmy* v. *Smith*, 11 East 25. And there seems to be no question the sheriff is amenable

for the act of his officers, though the offence be indictable: *Woodgate* v. *Knatchbull*, 2 T. R. 148.

And we see no objection in point of principle or precedent, to allowing an action in favor of the state upon all actions which sound in damages merely, and where the object is to recover a pecuniary mulct or penalty. Thus, in actions to enforce recognisances in criminal cases, or in penal actions, there would be no such uncertainty as would be likely to embarrass the courts or juries. It has been often held that the liability of a sheriff is in the nature of a tort, and that assumpsit will not lie: *Walbridge* v. *Griswold*, 1 D. Chip. (Vt.) 162. So also of a collector of taxes: *Charlestown* v. *Stacy*, 10 Vt. R. 562. But beyond this it seems to us the sheriff is so much a part of the government, being the head of the police force of the county and of the *posse comitatus*, that there would be an incongruity in quickening his pulses in favor of duty by an action on the case for any tortious act or neglect. The remedy of public opinion and in extreme cases, where there is reason to presume bad faith and criminal connivance, by attachment and imprisonment, in the discretion of the court, or by fine, would seem more natural and effective, in the majority of cases.

But we are not insensible to the fact that all punishment, as well as reward, is fast coming to be measured by its direct effect upon mutual interests and pecuniary advantage or loss. It is humiliating to reflect that it is so, so much as the stubborn facts compel us to recognise. And when that high sense of honor, that made the sheriffs of England to be reckoned among the nobility, as *vice comes*, or the deputy of the earl, when that fails to render such important officers insensible to all considerations except the strict law of duty, it may become necessary to extend pecuniary penalties so as to embrace all the duties of the sheriff.

I. F. R.

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## *Louisville Chancery Court, Kentucky.*

### HORD AND WIFE *v.* CRUTCHER AND ALEXANDER.

Real estate in Kentucky was sold under an execution during the rebellion. The owners were residents of Mississippi, a state at war with the United States. A. having deterred other purchasers by announcing that he was bidding for the owners, bought the land for half its real value, and afterwards sold and conveyed it to B. for double the price he had paid, and claimed to hold the proceeds for his own use: *Held* that

A. could not be considered a trustee for the owners by parol on account of the Statute of Frauds, nor by any form of contract, express or implied, because the owners were then public enemies.

The question whether or not B. had notice of A.'s announcement at the sale was therefore immaterial, and his title to the land valid.

But the owners might recover from A., as his acts did not constitute a contract but a tort, as to which the right of action was only suspended by the war.

The measure of damages is the advance A. received on his resale, allowing him interest on his payment, and reasonable commissions.

THE opinion of the court was delivered by

PIRTLE, Chancellor.—The plaintiffs were the owners of a tract of land in Jefferson county, Kentucky, which had been incumbered by certain liens that had been foreclosed, and a decree of sale obtained. At the time of the sale, in April 1862, the defendant Crutcher bid for the land, and announced that he was bidding for the owners of the land, who were in the state of Mississippi, and, of course, on account of the war, unable to attend personally to any business in Kentucky; and this announcement induced persons who intended to bid, to forbear; and the land was sold for less than its value by reason of this announcement. The party bidding was not an appointed agent.

In February 1864, the defendant Crutcher sold the land to the defendant Alexander, for something more than twice as much as he had bidden for it, and the plaintiffs brought this suit in October 1865, alleging these facts, and that Alexander was aware of the announcement of Crutcher at the judicial sale. This Alexander denies. I think it may be assumed from the proof, or for the sake of the argument, that a person who was an attorney at law, and who examined the title for and as the friend of Alexander, in his absence, had reasonable notice of the fact; but it is not shown that Alexander ever ordered the employment of an attorney to examine the title, or that he desired an examination to be made by his agent (for he bought by an agent), and the agent says in his deposition that he did not employ an attorney, and that he had no notice himself of what occurred at the sale, and it is not pretended that any notice came to Alexander personally until he had received the deed for the property and had paid a considerable portion of the purchase-money. Notice to the attorney at law was no notice to Alexander or his agent; and notice to an agent of an agent, unless he is also agent for the principal in fact, or by construction of law, by reason of privity, is no notice to the principal.

We see it laid down generally in many books, that to be a purchaser without notice, the party must have paid the whole purchase-money and received the deed; but this generally is only, or absolutely, true as to the purchase-money paid after notice, not as to what is paid before; for generally, not always, to that extent the purchaser has the better equity. It depends much on the relief the purchaser seeks—a lien on the land for what he paid, or the land itself.

The plaintiffs seek to recover the land from Alexander, because Crutcher held it as trustee for them; and Alexander says in addition to his want of notice, that they were of the people of the rebellious states, in actual war against the United States, aiding and abetting the enemies of the government at the time of the purchase of Crutcher, and of his purchase from Crutcher, and that there could be no such thing as the trust of an estate held for them according to the general laws of war, and the action taken by the Congress and the President in pursuance thereof. It appears they were residents of Mississippi at the time.

This defence I deem conclusive as to Alexander. There could not strictly be a trust estate in the lands created by oral declarations of Crutcher in favor of any person, and especially not of persons living in the enemy's country; and the state of Mississippi was then the country of an enemy. I am sorry to write it.

It is undoubtedly true that when a person, by his declarations at a public sale of property, induces other persons not to bid, because he is bidding for an absent or distressed owner, and he obtains the property for less than its value, by such means, and afterwards he pretends to hold it as his own, fairly bought; the courts will say it is *not fair* to hold it; and sometimes he is called a trustee; but this is only an artificial expression, made by the courts, to indicate the remedy to be given as to the thing so bought. He is a holder by indirection and wrong, unless the other party treats him with gross inattention of his kindness, if it were so originally intended, by not coming to stand in his place in proper time, on notice of what he has done.

In this case Crutcher could not be a trustee by parol according to the Statute of Frauds, and he could not be a trustee by any other shape of contract, because he could not make a contract in regard to property in Kentucky with the plaintiffs, who at that time stood as alien enemies, in Mississippi; and the law, of course, from what he did, would have implied no *contract* of trust with these parties, as a direct contract could not lawfully have been made, or any title or estate in trust created.

Then, as to Alexander, it does not matter whether he had notice or not.

But, as to Crutcher, how does the case stand?

He evidently, by his announcement that he was bidding for absent persons in this distressing time of war, did discourage, and indeed, stop other bidding, and did obtain the property for

much less than it was worth. Now, in this time of war, and general non-intercourse and common suffering, he could not have expected that the purchase-money could be repaid to him soon, or in any definite time; and it is not shown that the plaintiffs had any notice of what had been going on. They ought to have come forward to indemnify him at some reasonable time, under the circumstances, at any rate, or he might have sold the land to indemnify himself. But in February 1864 it was not reasonable for him to sell the land at such an advanced price, and put all the money in his own pocket (although, perhaps, he might have done so, as far as his own indemnity required), for the plaintiffs could not have been taken to have rejected the act which seemed a kindness.

The plaintiffs could not sue upon a contract or any declaration making him an actual trustee of the land for them; because the law of war did not allow such contract or declaration to be binding (nor did the Statute of Frauds), if no outside equitable circumstances were connected with the parol contract or declaration; and besides, it was *nudum pactum*, if it was only a pact; but here there was no sort of contract, for the plaintiffs knew nothing of what had taken place.

But their action is to be sustained upon the wrong done to them, by pretending to favor them when he brought an injury to them. Their action for this was suspended during the war, but when the war was over, their right to bring the suit, the *persona standi in judicio*, came to each of them as if there had been no war at the time. For the law of nations, in cases of wrongs to persons, or property, during the war—not in cases of contracts made during the war, for they are void—only suspends the remedy, because an enemy cannot bring an action, while standing as an enemy, in our courts, but when the war is over the wrong-doer is subject to the action for the wrong done during the war, not connected with the war in any way, as in the case of a tort; for then comes the right to sue, untouched by the war.

Crutcher must, therefore, pay to the plaintiffs what he received from Alexander over and above what he paid for the land, allowing interest on what he paid to the time when he was reimbursed by payment from Alexander, and reasonable commission; and the case is referred to the commissioner to report what this shall be, taking into consideration rents and improvements. And, as to Alexander, the case is dismissed.

*Circuit Court of the United States, Southern District of New York. In Equity.*

FREDERICK HUNT AND OTHERS *v.* A. J. JACKSON.

Where there is no conflict with the claims of domestic creditors, the assignees of a foreign bankrupt may sue in the United States courts for property of their bankrupt.

DEMURRER to a bill in equity. The petitioners were citizens of England, and are assignees in bankruptcy of one Goldring, an insolvent merchant of London. The respondent was a citizen of the state of New York, residing in the city of New York.

The material allegations of the bill, which were admitted by the demurrer, are as follows:—

That the bankrupt, Goldring, before his bankruptcy, carried on business as a merchant in London, and that on the 21st of April 1864 he had consigned to the respondent, a merchant in New York, an invoice of diamonds of the value of 1227*l.* 12*s.* 6*d.* for sale on commission, which diamonds duly came into the respondent's possession at New York.

That on the 8th of August 1864, at London, Goldring was, in the Court of Bankruptcy, duly adjudicated a bankrupt, and that on the 30th day of the same month the petitioners were appointed creditors' assignees, whereby the bankrupt's estate became vested in them.

That on the same day one Henry Honey, of London, was, at a meeting of the creditors, appointed manager to collect and wind up the estate of the bankrupt.

That on the first day of September 1864 Honey wrote to the respondent, on behalf of these petitioners, requesting him to remit the proceeds of the diamonds sold, and return those unsold.

That on the 30th of September 1864 the respondent wrote Honey in reply that all the diamonds remained unsold, and that he would return them as Honey might direct on receiving the amount of his outlay and expenses, amounting, as he said, to 264*l.* 14*s.* 4½*d.*

No account of outlay or expenses was rendered. The petitioners have repeatedly requested an account, but the respondent has omitted to render it.

On these facts the petitioners asked for an account and disco-

very of the expenses, and that upon payment to the respondent of such a sum as might be found to be justly due him for expenses, &c., on account of the diamonds, he might be ordered to surrender them to the petitioners.

The ground of demurrer was, in substance, that the petitioners as assignees under a foreign bankrupt law, had no legal capacity to institute and maintain this suit.

*A. J. Vanderpoel* and *E. Blankman*, in support of the demurrer.—I. The facts set forth in the bill of complaint do not establish any title to the diamonds, or any right to prosecute the defendant therefor. The complainants have no standing in court. Their appointment as creditors' assignees did not confer on them title to goods which at the time were out of the territory or jurisdiction of the court from which they received their appointment: *Harrison* v. *Sterry*, 5 Cranch 289; *Booth* v. *Clark*, 17 How. (U. S.) 322, 337; *Upton* v. *Hubbard*, 28 Conn. 274; *Cleve* v. *Mills*, 1 Cook B. L. 243; *Waring* v. *Knight*, Id. 307; *La Chevalier* v. *Lynch*, Doug. 170 (A. D. 1779); *Holmes* v. *Remsen*, 20 Johns. 229, overruling S. C., 4 Johns. Chanc. 460; *Blake* v. *Williams*, 6 Pick. 286; *Ingraham* v. *Geyer*, 13 Mass. 147; *Abraham* v. *Plestero*, 3 Wend. 538; *Johnson* v. *Hunt*, 23 Id. 87; *Mosselman* v. *Caen*, 34 Barb. 66; *Plestero* v. *Abraham*, 1 Paige 236; Am. Law Jour. N. S. 294, cited 6 Barb. 99 n.; *De Witt* v. *Burnett*, 6 Barb. 89; *Hoyt* v. *Thompson's Ex'r.*, 19 N. Y. 207, 224, 225.

II. The course pointed out by Lord KAMES seems to be the only one which can be adopted to vest the title in the assignees, and enable them to assert that title: Lord Kames's Prin. of Equity (4th ed.) 574.

III. If it is to be regarded merely as a question of legal assertion of title, the plaintiffs cannot sustain this action: *Morrell* v. *Dickey*, 1 Johns. Chan. R. 153; *Williams* v. *Storrs*, 6 Id. 353; *Campbell* v. *Tousey*, 7 Cow. 68; *Robinson* v. *Crandall*, 9 Wend. 426; *Parsons* v. *Lyman*, 20 N. Y. 103; *Britton* v. *Valentine*, 1 Curtis's Cir. Ct. R. 168, 174; *Attorney-General* v. *Bowers*, 4 M. & N. 171; *Same* v. *Dimond*, 1 C. & Jer. 356; *Stearns* v. *Bernhaus*, 5 Greenl. 261; *Thompson* v. *Wilson*, 2 N. H. 291; *Newton* v. *Bronson*, 13 N. Y. 587; *Booth* v. *Clark*, 17 How. 322, 337; *Blake* v. *Williams*, 6 Pick. 286, 313, 314.

IV. The complainants not having title to the subject of the action, cannot maintain this bill. They have no right to the discovery asked for. They have no right to call in question the amount of the lien, or to ask this defendant to account to them, or surrender the property to them.

There is no privity between the complainants and defendant; his liability is to Goldring—Goldring can come at any time and demand the property and the account: *Abraham* v. *Plestero*, 3 Wend. 538; Story's Eq. Pl. 728.

*C. C. Langdell* and *E. B. Merrill*, contrà.—I. The respondent presents a case wholly destitute of merit. He is certainly liable to account to some one, and the complainants are the only persons in the world who have any right to call him to account. His object in interposing this demurrer is to avoid accounting to any one, and thus to enforce the extortionate demand contained in his letter annexed to the bill of complaint.

II. We admit that the assignment in bankruptcy under which the complainants claim, has no force *proprio vigore*, and that it must be indebted for such force as it may have, entirely to the comity of this state.

This disposes of a large portion of the authorities cited for the respondent.

III. We also admit that this comity will not be extended so far as to deprive our own citizens of such remedies as our laws may afford to recover their debt.

This disposes of nearly all the other authorities cited for the respondent.

IV. The comity of this state will permit the assignment in question to have full effect upon the property of the bankrupt here at the time of the assignment, except so far as it may conflict with the rights of our own citizens. This is the rule declared in the third maxim of Huberus (Story's Confl. of Laws 929); sustained by the authority of Story (Ibid., § 938, 420); fully recognised by the Supreme Court of the United States (13 Peters 589), and established as the law of this state by the conclusive authority of the Court of Appeals.

The case of *Hoyt* v. *Thompson*, 1 Seld. 420, is precisely in point. It was an equity case, like the present; as in the present case, the defendants demurred to the bill, and the court unani-

mously overruled the demurrer upon the *sole* ground, that the complainants' title, which was under a foreign statutory assignment, was good *as against the debtor*, and so long as it did not conflict with the claims of *creditors, or bonâ fide purchasers in this state:* 1 Seld. 356, 357, 338, 344. The case came again before the court (19 N. Y. 207), when the previous decision was upheld (pp. 224, 226).

V. The case 1 Selden 420 renders it unnecessary to advert to the earlier cases in this state, and also shows that the *dictum* in *Mosselman* v. *Caen*, 34 Barb. 66, is not law. The case of *Willetts* v. *Waite*, 25 N. Y. 577, is in entire harmony with the views urged by us. The *dictum* in *Harrison* v. *Sterry*, 5 Cranch 302, is merely to the effect that a foreign bankrupt law has no effect here *proprio vigore*, which we have admitted: Story's Confl. of Laws, § 421; 1 Seld. 344, per RUGGLES, C. J. The case of *Booth* v. *Clark*, 17 How. 326, is not in point. That was the case of a *receiver in equity*, and it was expressly distinguished from the case of a statutory assignee.

VI. The case of foreign executors and administrators is not analogous to the present. The property of a person deceased is *in custodia legis* from the very moment of his death, until it is duly administered under the law of the state where it is found; and that is the reason why a foreign executor or administrator cannot sue in this state; he must take out letters here.

SHIPMAN, J.—The right of foreign assignees in bankruptcy to maintain suits in the courts of this country, and the extent of that right, if any exists, has been repeatedly and elaborately discussed both by elementary writers and in judicial opinions. Great diversity of views has been expressed, and different results reached in different cases. No advantage would be gained by a rehearsal of these discussions here. In nearly all the cases where the rights of the foreign assignees have been contested, there has been a conflict between their alleged rights and the claims of other parties, citizens or residents of our own country, or aliens pursuing remedies in our own courts, against the assets of the bankrupt. But in the language of Mr. Justice STORY, in his Conflict of Laws, § 420: "In most of these cases in which assignments under foreign bankrupt laws have been denied to give title against attaching creditors, it has been distinctly admitted that

assignees might maintain suits in our courts under such assignments for the property of the bankrupt. This is avowed in the most unequivocal manner in the leading cases in Pennsylvania and New York already cited, and it is silently admitted in those of Massachusetts."

This statement of the law is cited and concurred in by RUGGLES, C. J., in *Hoyt* v. *Thompson*, 19 N. Y. 207, decided by the New York Court of Appeals in 1851; and PAIGE, J., in an opinion delivered in the same case, remarks: "Where neither the rights of domestic creditors, or of foreign creditors proceeding against the property under our laws, are involved, the foreign assignee may be permitted to sue in our courts, for the benefit of all the creditors, on principles of national comity, without a surrender of the principle that a foreign statutory assignment does not operate a transfer of property in this state."

The result of the cases was accurately stated by Mr. Justice STORY, and citations might be multiplied from judicial opinions, which, while they deny the right of the foreign assignee where it conflicts with the claims of creditors seeking the aid of our own courts, almost invariably concede his capacity to sue as the representative of the bankrupt to the same extent which the latter could have done if no bankruptcy had taken place. This, as already shown, was evidently the judgment of the New York Court of Appeals when the case of *Hoyt* v. *Thompson* was decided.

The only doubt which has been raised as to the correctness of this view of the law, so far as we know, has originated from the remarks of the judges in the cases of *Mosselman* v. *Caen*, 34 Barb. 66, and in *Willetts* v. *Waite*, 25 N. Y. Court of Appeals 377. But the former case was disposed of on other ground. The latter followed *Hoyt* v. *Thompson*, and as an authority it goes no further than that case. (See Judge ALLEN'S opinion, p. 587.)

It is true that the same judge (p. 586), after stating that "the rule in the state and in the United States is, that in cases of assignment by operation of law, the assignees are in the same situation as the bankrupt himself in regard to foreign debts—they take subject to every equity, and subject to the remedies provided by the law of the foreign country where the debt is due, and the property is situated," adds: "The reasoning of our

courts would, doubtless, carry the rule further, and prohibit assignees under foreign bankrupt laws from suing in our courts." The rule has never been carried to this point by the courts of New York, in any decision where the precise question was necessarily involved. We certainly shall not lead the way in that direction, and should hesitate somewhat before we followed.

The demurrer is overruled with costs.

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*Supreme Court of Illinois.*

TAYLOR *v.* THOMPSON ET AL.

Where the constitution provides that the corporate authorities of counties, townships, school-districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in regard to persons and property within the jurisdiction of the body imposing the same, and that the specification of the objects and subjects of taxation shall not deprive the General Assembly of power to require other objects and subjects to be taxed in such manner as may be consistent with the principles of taxation fixed in the constitution, an Act of the General Assembly authorizing the towns in certain counties therein named to levy a tax to pay bounties to persons who should thereafter enlist or be drafted into the army of the United States, a vote of the people of such towns having been first taken, is not unconstitutional.

The opinion of the court was delivered by

LAWRENCE, J.—On the 5th of February 1865 the legislature passed a law (page 102, Probate Laws of 1865), authorizing the towns in certain counties therein named, to levy a tax to pay bounties to persons who should thereafter enlist or be drafted into the army of the United States, a vote of the people of the township being first taken. The people of the township of Odell, in the county of Livingston, voted a tax under this law, and the appellant, alleging that he was a non-resident of the township, but owning property there, filed a bill to enjoin the township officers from its collection. The tax is resisted on the ground that it was unconstitutional.

The fifth and sixth sections of article 9 of the constitution are as follows:—

"5. The corporate authorities of counties, townships, school-districts, cities, towns, and villages, may be vested with power to

assess and collect taxes for corporate purposes, such taxes to be uniform in regard to persons and property within the jurisdiction of the body imposing the same; and the General Assembly shall require that all property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under the authority of law.

"6. The specifications of the objects and subjects of taxation shall not deprive the General Assembly of the power to require other objects or subjects to be taxed in such manner as may be consistent with the principles of taxation fixed in the constitution." See article 9, sections 5 and 6.

It is urged that the tax in question is not a tax for "corporate purposes," within the meaning of the foregoing provision.

While there are some objects of taxation so marked and distinctive that no person would feel any difficulty in determining whether they did or did not fall under the head of "corporate purposes," there are many so uncertain in their character that the most intelligent and candid minds would differ in regard to them. When, therefore, the legislature has authorized the levy of certain taxes, and has thereby declared them to be, in its opinion, taxes for "corporate purposes," we should not hold such taxes to be unconstitutional, merely because their corporate character admits of some debate. A proper respect for the legislative department of the government requires us to regard its acts as *primâ facie* constitutional, and when the question turns upon the precise meaning of a phrase of ambiguous import, we must needs hesitate long before we pronounce an act of the legislature void.

Again, the words "corporate purposes," as used in the constitution, should not receive a narrow or rigid construction. The framers of that instrument must have designed to leave a large discretion to the legislature, as to what should be considered as falling within that phrase. Under democratic forms of government, the object of those clauses in a written constitution which restrict the power of the legislature, is to preserve a minority from injustice at the hands of a majority. Under the constitution of Illinois, this object is attained, so far as relates to taxation, by the provision in the second section of the ninth article, requiring taxation to be by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or its

property. This provision, so long as it is observed, secures equality of taxation between all classes and individuals, and thereby protects every class from oppression by any other. The legislature will necessarily be composed, in a very large degree, of persons who are not only property-holders themselves, but the representatives of property-holders, and as every tax imposed or authorized must bear equally upon all property within the district where it is to be levied, and by whose votes it is to be raised, the sharp dictates of self-interest may be safely relied upon as a security against oppressive or unjust taxation. That the framers of the constitution deemed they had furnished all the safeguards necessary on this behalf, when they provided for absolute equality of taxation, and that they thought it unwise to hamper the legislature with any restrictions as to either the subjects or the purposes of taxation, is evident from the sixth section of the ninth article above quoted. That section provides that the specification of the objects and subjects of taxation shall not deprive the legislature of the power to require other objects or subjects to be taxed. We do not quote this as showing that the legislature may authorize a municipality to impose taxes for other than "corporate purposes," but as illustrating the fact that the framers of the constitution thought proper to rely upon the great principle of absolute equality of taxation as a guarantee against its abuse, rather than upon a minute specification of its subjects and aims. And who will deny that this was a wise abstinence on their part, when we take into view the ever-varying emergencies of society, and the rapid developments and unforeseen needs of our modern civilization?

We have made these general remarks for the purpose of showing that when the constitution authorized the legislature to empower municipalities to impose taxes for corporate purposes, with the additional provision that such taxes should be "uniform in respect to persons and property within the jurisdiction of the body imposing the same," it has not designed that the phrase "corporate purposes" should receive so narrow a construction as to justify the courts in holding that a municipality should not tax itself, although authorized by an act of the legislature, because it might be a debateable question whether the proposed tax would promote the corporate welfare or not. That a tax may be plainly beyond this limit as to call for the interposition of

courts, we do not deny. What we insist upon is, that unless the case is exceedingly clear, we should not interfere to annul a self-imposed tax possessing the constitutional quality of uniformity in respect to persons and property.

We proceed to consider the question whether a tax imposed for the purpose of raising bounties to secure volunteers in the late war can be properly called a tax for "corporate purposes." We may define this phrase to mean a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it. That every individual tax-payer shall have a direct interest in the object for which every tax is laid, or be directly benefited by its expenditure, is unattainable in the very nature of things. General results are all that can be expected, and if it appear that a tax has been voted and levied with an honest purpose to promote the general well-being of the municipality, and was not designed merely for the benefit of individuals or of a class, its collection should not be stayed by the courts. In a community, for example, composed of the various religious sects, it could hardly be contended that a tax levied upon all to build a church, or support a clergyman for the benefit of a particular denomination, was a tax for a corporate purpose. So too, if a tax were levied in order that its proceeds might be paid over, as a gratuity, to some individual who enjoyed for the time being the favor of the multitude, there would be no pretence for calling it a tax for corporate or municipal purposes. But on the other hand, a very considerable portion of the taxes in every municipality are of such character as not directly to benefit non-resident tax-payers, nor indeed every resident. Thus, the creation of a police force, the establishment of a reform school for juvenile offenders, of a hospital for persons ill with contagious disease, would not directly benefit a non-resident taxed for their support, and yet no person would deny that these are proper ends of municipal taxation, and justly included in the words "corporate purposes." They are so, because, while individuals are benefited by the expenditure of such taxes, yet their purpose and object are the security of the public against public evils, and the promotion of the corporate welfare.

Where, as in the case before us, the solution of a question turns upon the meaning of a phrase, we must ascertain in what sense it has been used in analogous cases. We reason from con-

ceded truths, and we may take the foregoing illustrations as admitted instances of taxation for corporate purposes. They are established by fixed and uncontroverted usages. The tax sought to be enjoined in the case before us is noble in its character, because the result of new emergencies, but can it be fairly said to be any less a tax for a corporate purpose, than taxes for the objects above named? Would the opening of a road, the laying out of a public square, the purchase of a fire-engine, the creation of an almshouse, be as important to the general interests of a community, as was exemption from the necessary but dreaded conscription during the last years of the late war? Doubtless in all communities there were tax-payers who would not be personally liable to the draft, but who was there in any community, so isolated as not to be liable to be stricken by it through his kindred or friends, or injured in his pecuniary interests through the complex relations which men bear to each other in society? The teachers who educate our children, the clergy who administer the consolations of our holy religion to the sick and dying, the magistrates who guard our laws, the mechanics who carry on our industries, the farmers who supply our food, were equally liable to be swept from the various communities which were thriving upon their labors. And can it be truthfully said that the sudden tearing away of whole classes of such men, was not an injury to the entire community, and that a tax by which it could be avoided was not a tax for a "corporate purpose"? But besides all this, many of these men would leave behind them families that had derived their support from the daily toil of the husband or the father, and these families, in his absence, would fall upon the community for support.

These evils were not wholly avoided by furnishing volunteers, but they were immeasurably lessened. For the volunteers were largely made up of the youth of the country—promising and gallant it is true, and consecrating for ever the battle-fields where so many of them laid down their lives—but still so young that a large part of them had not become the heads of families, or settled as a permanent element in society. The departure, therefore, of fifty or a hundred volunteers from a small community, inflicted upon its general well-being and prosperity a far less violent shock than would have been caused by the loss of the same number of persons torn away by the indiscriminate chances of the draft, and

in view of this fact, a tax levied for the purpose of saving a community from the evils inseparable from a draft, may be fairly considered a tax for the common good.

There is another consideration which lends a potent support to the validity of this tax. Under the system of drafting adopted by the Federal Government, each city and township in the state was assessed for its respective quota of men. It was determined what amount of military service was due to the government from each municipal community, under the Acts of Congress, to which all owed obedience. The rendition of this service was a burden resting on the entire community, and no more due from one individual member of it than from another. True, the service could only be exacted from persons within certain ages, but the exemption was granted, not because the service was not morally due from all alike, but because, under and over certain ages, the law presumed a physical disability to render it.

The service being thus due from the entire population of a town, and, as citizens of a common country, due from all the constituents of the population alike, the legislature authorizes the town to relieve itself from the burden, if it can do so, by hiring competent men voluntarily to perform the required service.

By the chances of the draft this burden might fall on the shoulders of ten men out of every hundred, and yet morally it would no more belong to any one of the ten who might be taken, than to any one of the ninety who might be left. Even legally, it would devolve on them only because blind chance so determined. Now if this burden, properly resting on the whole community, could be changed into the form of voluntary service, and thus rendered not only vastly less onerous to the entire community, but be equally distributed among them in the form of a pecuniary tax, can there be really any question that such a tax would be a tax for a "corporate purpose"? The service was assessed against a town as a corporate community, and as such community it renders the service by the aid of a corporate tax. The tax is levied, not for the benefit of the volunteers who receive its proceeds, but for that of the community to whom it brings relief.

We hold the acts of the legislature authorizing the levy of these taxes to be constitutional.

We must not, however, be understood as expressing any opinion as to that portion of the law which authorizes the payment of a bounty to men already drafted. That there is a difference between bounties to drafted men and bounties to volunteers is obvious, and whether the former are sustainable is a question which we will not decide until called upon to do so by the record. The case before us does not present that point. It was heard on demurrer to the bill, and the demurrer was sustained. The bill nowhere alleges that any portion of the taxes sought to be enjoined, were levied for the purpose of paying bounties to drafted men. The averment is simply that the taxes are levied "for the purposes recited in the act aforesaid." *Non constat* but that they may have been all levied for bounties to volunteers. Or, if it be said that the averment is in substance that they were partly levied for volunteers and partly for drafted men, then, even if it should be held that the last-named purpose was unlawful, the demurrer must still be sustained.

If a judgment for taxes is brought to this court, and it appears that it has been rendered for taxes, a part of which are illegal, the judgment will be reversed, as in the case of *Campbell* v. *The State*, decided at the present term, because the judgment is a unit. But when a bill in chancery is filed, to enjoin the collection of taxes, on the ground that they are in part illegal, the bill must show to what extent they are so, in order that the court may enjoin only the illegal portion, or else must show they are so levied that it is impossible to discriminate between the legal and illegal portion. There are no such allegations in this bill.

We remark, in conclusion, that taxation for a similar purpose has been held valid by the Supreme Court of Pennsylvania, in the case of *Speer* v. *School Directors of Blairsville*, reported in 4 Am. Law Reg. N. S. 661, and in the Supreme Court of Connecticut, in *Booth* v. *The Town of Woodbury*, 5 Id. 202.

Decree affirmed.